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Supreme Court of the United States

OCTOBER TERM—1957

No. ~~996~~ 137 9

HOWARD LAWN,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Supreme Court of the United States

OCTOBER TERM—1955.

No. .....

HOWARD LAWN,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Howard Lawn prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on April 20, 1956.

Opinions Below

The opinion of the Court of Appeals, Second Circuit, appended hereto is reported in 231 F. 2d —. No opinion was delivered in the District Court following the trial. The pre-

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Figures in parentheses refer to pages of Appendix to briefs of appellants in the court below; page references followed by the small letter "a" are references to the Appendix to the Government's brief below; page references "A-a" are to Appendix in *U. S. v. Roth*, incorporated in the record below.

trial opinion of Goddard, *D.J.*, dismissing the original indictment is reported in 115 F. Supp. 674. The pre-trial opinion of Palmieri, *D.J.*, denying a hearing on use of illegal evidence not returned as ordered by the court is reported in 16 F. R. D. 268.

Jurisdiction

The judgment of the Court of Appeals was entered on April 20, 1956. Appendix A, *infra*. A timely petition for rehearing (filed April 25, 1956) was denied on May 8, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Whether constitutional protection is vindicated where, in obtaining a conviction, a prosecutor uses unconstitutionally secured evidence which he failed to return although ordered before trial to do so (by two Judges).

2. Whether a defendant's constitutional protection is vindicated where a hearing is refused on the uses made of unconstitutionally obtained evidence, on a record showing actual use on the trial of some tainted evidence and that the prosecutor had actual possession of all the tainted evidence at the time of indictment.

3. Whether the wilful failure to pay an income tax liability, absent any deficiency in the tax returns, is a felony under Title 26, § 145(b).

4. Whether the constitution permits an inference of guilty knowledge from the circumstance of a defendant's legal astuteness, where astuteness has no relevancy to guilt of the crime charged.

5. Whether guilt may be bottomed on association and presence and proof of acts beyond the limitary period and proof of acts after the completion of the crime.

6. Whether due process permits the prosecuting attorney on summation to go outside the record and to expressly "vouch" for the convicting testimony of admitted perjurers and criminals and to couple therewith the assertion to the jury that he personally believes that they told the truth.

Constitutional Provision and Statutes Involved

The pertinent constitutional and statutory provisions are set forth in Appendix B, *infra* (pp. 34-35).

Statement

This is a prosecution for alleged tax crimes. Petitioner, Lawn, is charged—not as a taxpayer—with assisting defendant taxpayers to fail to pay their duly reported tax liabilities. The government concedes as to the counts against Lawn that it does not challenge the accuracy of the amounts of income and of taxes reported. These counts rest solely on the theory that wilful failure to pay a tax truthfully reported constitutes a felony (2715, 2717). 26 U. S. C. § 145(b).

Lawn was charged with conspiring to make it impossible for the government to reach assets of his co-defendants. The case was tried on the theory that the conspiracy began some eight years prior to the finding of the indictment (July 23, 1953), and continued long after criminal charges had been filed against the defendants on September 14, 1950 (A4a). Thus evidence was introduced with respect to alleged acts that occurred prior to July 23, 1947 and subsequent to September 1950.

Lawn was a salaried employee of the taxpayers engaged in research and import-export activities (1023). His salary was moderate in view of the scope of his duties, varying between $250-$350 per week (1915-24). He was also an officer and director of some of the corporations involved (1915-24), although there is no evidence that these titles were anything

other than nominal, as is customery in close corporations dominated by one man—here, Giglio.

After leaving the office of the United States Attorney for New Jersey, where he had served as Chief of the Criminal Division, Lawn was employed by some of the taxpayers (15a). He did not function as an attorney for the taxpayers who retained other counsel for even the simplest transaction (1065-6, 1076, 1115, 1470, 2168, 2230). Lawn did not advise or prepare any tax return (1076).

In such setting the prosecutor and the Court below sought to spell out the case against Lawn [1] by drawing inferences of guilt from Lawn's associations with the taxpayers; [2] by inferring knowledge on the part of Lawn of the taxpayers' wrongs from legal abilities ascribed to him; [3] by pointing to Lawn's acceptance of salary for his business services; [4] by acts after termination of the alleged crimes (e.g., 1218-9, 1237-9, 1075) and [5] by acts beyond the six-year limitary period (e.g., 1124-5).

Each of the findings of the Court below as to Lawn's connection with the crimes of the other defendants is contrary to the Government's testimony. Its witness Roth absolved Lawn and implicated the other defendants. No prima facie case was made against Lawn and the jury could reasonably have acquitted him. We mention this only in passing at this time.

A glaring omission in the case was absence of proof of a connecting link or a stake in the crimes on the part of Lawn. The prosecutor sought to overcome these deficiencies by claiming that Lawn had received $15,000 from the taxpayers and by inferring that he was thus paid for a part in the crimes. As alleged proof of the link and stake, the prosecutor introduced in evidence two exhibits (61A and 61B) which he repeatedly used with material effect during the trial and on summation (1019-22, 2598, 2603-7, 2657-8). There was no other evidence from which an argument could properly be made that Lawn was implicated.

This alleged linking evidence was previously stamped by the District Court as unusable because it was unconstitutionally obtained from the defendant Lawn; this evidence had been retained by the prosecutor despite orders from two Judges to return the same (A167a, A170a, 184).

The history of the alleged linking proof used by the prosecutor, Exhibits 61A-B, is as follows:

Criminal informations had been filed in 1950 against the taxpayer-defendants and against Lawn as an aider and abettor, charging failure of the taxpayers to pay income taxes for 1946 (A161a, 1a-11a). The defendants pleaded not guilty (A5a). These informations were not brought to trial.

In July 1952, while the informations were pending, Lawn and his co-defendants were subpoenaed by the Federal Grand Jury to testify and furnish evidence concerning the same tax matters, among other things (A162a, A54a-59a). Lawn was compelled by the Grand Jury to produce evidence of the receipt by him of $15,000 from the taxpayers. This was evidenced by a check and the corresponding check stub book entry marked as Grand Jury Exhibits Nos. 2 and 4 on July 15, 1952 (A71a-78a).

The Grand Jury took a photostatic copy of the two papers; the photostats were physically made by the office of the prosecuting United States Attorney on July 15, 1952, on instructions of the Grand Jury, before the original papers were returned to Lawn (A76a-77a).

The Grand Jury then promptly indicted Lawn and the others in connection with the 1946 income tax liability already the subject of the criminal informations against them. These indictments were dismissed by Goddard, *D.J.*, as obtained in violation of the privilege against self-incrimination and as unconstitutional. *United States* v. *Lawn*, 115 F. Supp. 674 (D. C. N. Y. 1953). The Judge's opinion and order directed the Government to return the partnership and personal records (including Exhibits 61A-B) produced by the defendants before the Grand Jury (A167a, A170a).

The Government appealed from the dismissal and in 1953 (A171a), while the appeal was pending and prior to the return of the tainted documents, the prosecutor obtained the present indictments which are in material respects identical with the 1952 indictments (10-21, 149). The Government's appeal was subsequently dismissed, as not timely taken. *United States* v. *Roth*, 208 F. 2d 467 (2 Cir. 1953).

Lawn moved in advance of trial before Palmieri, *D.J.*, to dismiss the present indictment and for a hearing to suppress the illegal evidence and for a hearing to examine the uses which the Government had made of the illegal evidence, which it had not yet returned. Lawn further requested compliance with Judge Goddard's order to return the documents taken by the 1952 Grand Jury (26).

Judge Palmieri denied the motions for a dismissal or a hearing because "the weight of the affidavits presented by the Government is much greater than that of the *post hoc propter hoc* and the conjectural arguments advanced by the defendants" (183), but he did order the return of the partnership and personal records produced by the defendants before the 1952 Grand Jury (184). There is no indication that the Judge himself examined the 1953 Grand Jury minutes to satisfy himself as to the reliability of the affidavits presented by the Government in which it denied use of the non-returned tainted evidence.

The defendants made recurrent motions thereafter on the trial for a hearing on whether use had been made of the tainted evidence. These motions were successfully blocked by Government affidavits asserting that the tainted documents had not been and would not be used in the prosecution or on the trial (244-8, 1356, 1943-5, 2076-88, 2136-7, 2505, 2[illegible], 87a-97a, 100a-110a).

The prosecution and the Grand Jury had promised to provide the defendants with an itemized receipt for the documents improperly obtained, but they never did so (A150a). When a large batch of documents was finally returned, the defendants were then being represented by new counsel (125, A28a-29a) and neither Lawn nor the others could tell whether all of the documents taken from them had been returned. (The returned papers did not include Exhibits 61A-B.)

On the trial the prosecutor offered photostats of the $15,000 check and of the corresponding check stub book entry. The Government witness at the time was the defendant Roth who, perforce could not testify to the source from which the Government had obtained these photostats. He was questioned

preliminarily by the defendants concerning the handwriting and the signature on the documents and they were then admitted without objection (on this score of course) as Exhibits 61A-B (1022).

The first detection of the tainted character of these documents was made just before the appeal was argued in the Court below. The photostat of the check had been folded over and the sides stapled together. The check stub had also been folded over. Close inspection of the inner sides of the photostats for the first time revealed physical markings showing that the photostats were those taken on July 15, 1952, by the prosecutor's office from the tainted originals, under command of the Grand Jury, as mentioned above. It was only when the inner sides of the photostats were exposed that the illegal source of the exhibits became apparent.

During the trial itself the prosecutor and his staff had by affidavits and oral certifications blocked all inquiries demanded by the defendants to establish the origin and source of evidence used by the Government in this prosecution before the Grand Jury and on the trial. These affidavits certified to the Court and to defense counsel that no use would be or had been made on the trial, of the papers which had been suppressed and which the prosecutor had twice been directed to return (1943, 2083, 87a-97a). The Court below approved the exercise of the discretion of the trial Judge in accepting these certifications and refusing a hearing to the defendants (Appendix A, *infra*, p. 31).

It is incontrovertible in the present record that Exhibits 61A-B were two of the papers obtained in violation of the privilege against self-incrimination and ordered by two District Judges to be returned to Lawn, and it is incontrovertible that the prosecutor did not comply with the Judges' orders. It is further incontrovertible that the prosecutor did in fact use tainted evidence on the trial notwithstanding his recurrent certifications to the contrary. One such certification was filed at the close of the trial before sentence of two of the defendants. The opinion below does not discuss or challenge these incontrovertible facts.

The Court below exonerated the trial use of the evidence unconstitutionally obtained, Exhibits 61A-B, reasoning that Lawn had suffered no harm "whatsoever" and was deemed to have waived his objection because his counsel had, generally, the opportunity of cross-examination (but not of any person having knowledge of the source) and had preliminarily inquired concerning the identity of the handwriting and signatures on the photostats. The Court below bottomed this ruling of harmless error on the following basis unsupportable in law:

> "Further, on this appeal the government offers to prove that other copies of the same documents were in its possession months before the 1952 proceedings and that these 'untainted' copies could have been easily substituted at trial if the discrepancy had been pointed out by objection of defense counsel. Lawn therefore suffered no harm whatsoever and has obviously waived his objection." (Appendix A, *infra*, p. 32)

In thus going outside the record, the Court below was erroneously led to a further series of material errors. There were no other copies of Exhibits 61A-B in this prosecutor's possession before the 1952 proceedings or at the time of the trial. The prosecutor did not obtain the so-called "untainted" copies until January, 1956, or nearly a year after the trial and just before the argument of the appeal below. After being advised that petitioner's appellate counsel had detected the use of unconstitutional evidence, the prosecutor then set about for the first time to seek out and secure the copies referred to as "untainted" by the Court below. These facts came to light following the oral argument in correspondence and conversation with the prosecutor. (See petition for rehearing below setting out the correspondence.)

The naked facts are that the prosecutor used Exhibits 61A-B on the trial and these were the only copies in his possession or that he had ever seen up to and at that time.

So far as this record goes, there was no other copy of Exhibits 61A-B in existence, "untainted" or otherwise.

Moreover, since the original papers were tainted in 1952, there is, at the least, the probability that the claimed "un-

tainted" copies fall under the same ban and also that such copies derive from the lead or clue given in vitiated New York proceedings.

It is further clear from the record that the tainted documents were used on the trial as a lead or clue to considerable testimony adduced by the prosecutor (1018-22, 1073, 1074-5).

Suffice to say that compliance with orders to return all tainted evidence would have avoided the cumulative series of errors because the unusable papers would not have then been available to or used by the prosecutor on the trial.

REASONS FOR GRANTING THE WRIT

I.

Question No. 1

The prosecutor was ordered by two District Judges to return illegally obtained evidence, the procurement of which vitiated the first indictment. He did not comply with the Court orders. He then used the illegal evidence on the trial to obtain a conviction of Lawn. The Court of Appeals in effect has sanctioned the violation of the District Court orders stamping the evidence as unusable and has sanctioned the use of the unconstitutional evidence to ground the conviction.

There was here an incontrovertible use on the trial of evidence obtained in violation of the privilege against self-incrimination. The Court of Appeals disposed of the infraction of constitutional rights on the ground that the error was harmless or waived.

The notion that the error was harmless is bottomed on acceptance of the Government offer to prove on appeal that other evidence was available and could have been used. The prosecutor offered on the appeal to prove that he had used the wrong copies and that proper copies were in the general custody of the Government (but not in his possession) at the time of the trial.

The prosecutor's post-trial realization that evidence *not used* was available does not absolve trial use of constitution-

ally tainted evidence. Indeed, there was no "available" other evidence at the trial scene or in the prosecutor's custody (cf. Pet. for rehearing below). And moreover, the taint of the originals permeated and barred the unused and all other copies.

Constitutional error is never harmless and the decision below that it may be harmless, is in square conflict with applicable decisions of the other Circuits.[1]

The Court below accepted as proof, an offer on appeal to establish that untainted proof "could have been easily substituted at trial if the discrepancy had been pointed out by objection of defense counsel" (Appendix A, *infra*, p. 32). This improperly shifted a burden to defendant to detect non-compliance by the prosecutor with directions from two Judges and was an unparalleled extension of appellate power on review.[2] Reliance on a mere offer also denied to petitioner his constitutional rights to be confronted by witnesses, to cross-examine them and to refute the offer of proof made on the appeal.

The further ruling of the Court below is, that questioning preliminary to the admission of evidence is a waiver of fundamental rights. However, in this case the preliminary questioning was conducted in the light of the vouchers from the prosecutor that no tainted evidence had been or would be used and was limited by the Court's denial of a hearing on the use of tainted evidence.

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[1] *Helton* v. *United States*, 221 F. 2d 338, 342 (5 Cir. 1955); *Wrightson* v. *United States*, 222 F. 2d 556, 561 (D. C. Cir. 1955) and see dissent of Judge Frank in *United States* v. *Grunewald*, April 10, 1956 (2 Cir. 1956); *cf. United States* v. *Shotwell Mfg. Co.*, 225 F. 2d 394, 406 (7 Cir. 1955).

[2] *Sibley* v. *Pullman's Palace Car Co.*, 120 U. S. 575 (1887); *Thomson* v. *Gaskill*, 315 U. S. 442 (1942); *Drake* v. *General Finance Corp. of Louisiana*, 119 F. 2d 588 (5 Cir. 1941); *Pilger* v. *Sutherland*, 57 F. 2d 604 (D. C. Cir. 1932); *Smith* v. S. S. *Kresge Co., Inc.*, 79 F. 2d 361 (8 Cir. 1935). The decision is even in conflict with applicable decisions of the Second Circuit, but decided by different benches. *Oliver American Trading Co., Inc.* v. *Government of the United States of Mexico*, 5 F. 2d 659 (2 Cir. 1924); *Bono* v. *United States*, 113 F. 2d 724 (2 Cir. 1940).

The witness (Roth) who was preliminarily questioned had no part in the procurement by the Government of the unconstitutional evidence and was not in a position to give testimony as to the source of the papers on which he was being questioned. He was examined merely to identify the handwriting and the signatures (1022).

Furthermore, the constitutional point was adequately saved. Before the trial the defendant had moved to dismiss the first indictment and for the return to him of the papers, which motions were granted by Goddard, *D.J.* (A167a). Likewise, before the trial, the defendants had moved to dismiss the second indictment, to suppress the evidence illegally procured in connection with the earlier indictment, and for an examination to ascertain the uses to which the tainted evidence had been put, which motions were denied by Palmieri, *D.J.* (179-185). On the trial, the defendants had again moved for an examination to ascertain the uses to which the tainted evidence had been put, but these motions were denied by Walsh, *D.J.* (247, 1356, 1945, 2085-6, 2136-7, 2505).

The unconstitutional use was not apparent to the defendant at the time; the form of the evidence concealed telltale marks which identify it as illegally procured. These telltale identifying marks on the inner sides of the photostatic exhibits were hidden from view because the inner sides had been stapled or folded over. The stamps showed that the photostats were those illegally exacted and made on July 15, 1952, by the United States Attorney. These stamps could be exposed only by removal of the stapling or unfolding the photostats.

As there was no warning of the course taken by the prosecutor, so also there was no consent or waiver. Every reasonable presumption is against waiver of fundamental rights.

The lack of specific objection at the precise moment when the photostats were offered in evidence was not to be taken as a conscious relinquishment of the repeated assertions of unconstitutional procedure on the Government's part and of misuse of illegal evidence. The Government's sworn certifications that no illegal evidence would be or had been used on the trial or in the prosecution and the hidden origin of the

photostats prevent the assessment of a waiver against the defendant.

Obedience on the part of the prosecutor to court orders to return the documents to Lawn would have precluded the Government's error in using the tainted photostats on the trial. The consequences of that error, whether it was deliberate or inadvertent, are to be visited on the Government, not the defendant, since the law bars absolutely any use of illegal proof.[3]

There was no waiver of the constitutional privilege.[4]

Question No. 2

The constitutional protection due to a defendant was not safeguarded by the Court below in ruling against a full dress hearing on oral testimony into the use made of evidence which had vitiated the first indictment. This evidence had been retained by the Government during the Grand Jury proceedings which yielded the present indictment. The present indictment is identical with the vitiated indictment with small changes of figures. The Court below had incontrovertible proof in the record of use on the trial of objectionable evidence.

This Court has stated the rule that "the burden is, of course, on the accused in the first instance to prove to the Trial Court's satisfaction that wire tapping (self incrimination in the case at bar) was unlawfully employed. Once that is established—as was plainly done here—the Trial Judge must give opportunity however closely confined to the accused, to prove that a substantial portion of the case against him was a fruit of the poisoned tree." *Nardone* v. *United*

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[3] *Rea* v. *United States*, 350 U. S. 214 (1956); *McDonald* v. *United States*, 335 U. S. 451 (1948); *Nardone* v. *United States*, 308 U. S. 338 (1939); *Gouled* v. *United States*, 255 U. S. 298 (1921); *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920); *McGinnis* v. *United States*, 227 F. 2d 598 (1 Cir. 1955); *Petition of Provoo*, 17 F.R.D. 183, 202 (D. C. Md. 1955), affd. 350 U. S. 857 (1955); *United States* v. *Coplon*, 185 F. 2d 629, 640 (2 Cir. 1950), Judge L. Hand.

[4] *Blok* v. *United States*, 70 A. 2d 55, 57 (Mun. Ct. App. D. C. 1949); *Glasser* v. *United States*, 315 U. S. 60, 70 (1942); *Ohio Bell Tel. Co.* v. *Public Utilities*, 301 U. S. 292, 306-7 (1937).

States, 308 U. S. 338, 341 (1939).[4] The denial of such opportunity to the defendants at bar was fundamental error.[5]

The defendants were concluded on their application for a hearing by affidavits. It was fundamental error to sustain the conclusiveness of such affidavits.[6] Like affidavits were found contrary to fact when the first indictment was dismissed; and Exhibits 61A-B make it plain of record that the trial affidavits were not factually correct either.

Where any use of tainted evidence is shown or reasonably probable, unless means of discovery of constitutional transgression are afforded, there might as well not be any constitutional provision—the constitutional protection becomes an illusion, not a safeguard.

The ruling below made available to the prosecution the fruits of its neglect to comply with orders of the Court which the prosecutor was bound to obey.[7] The ruling below represents a wide departure from the uniform current of this Court's decisions.[8]

II.

Question No. 3.

The decision below construes a tax statute 26 U. S. C. § 145(b) as embracing within felony, a failure to pay one's taxes as distinct from thwarting the imposition thereof.

The Judge charged the jury as follows:

"Now we come to counts 7 and 8. * * *"

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[4] *Gouled* v. *United States*, 255 U. S. 298 (1921); *Amos* v. *United States*, 255 U. S. 313 (1921); *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920); *Nardone* v. *United States*, 308 U. S. 338 (1939).

[5] *Herman* v. *Claudy*, 350 U. S. 116 (1956); *U. S. ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954).

[6] *McNabb* v. *United States*, 318 U. S. 332 (1943); *Weeks* v. *United States*, 232 U. S. 383, 390-4 (1914); *Bram* v. *United States*, 168 U. S. 532, 544 (1897) *Boyd* v. *United States*, 116 U. S. 616, 630 (1886).

[7] *Lewis* v. *United States*, 146 U. S. 370 (1892); *Glasser* v. *United States* 315 U. S. 60 (1942); *Wiborg* v. *United States*, 163 U. S. 632 (1896); *Clyatt* v. *United States*, 197 U. S. 207 (1905); *Weems* v. *United States*, 217 U. S. 349 (1910); *Brasfield* v. *United States*, 272 U. S. 448 (1926).

> Here, however, the Government says it is not charging him with falsely reporting taxes. It says, taking their taxes as reported, they evaded payment of those taxes by concealing assets, to make it impossible to collect those taxes. * * *" (2754)

> "Now we come to count 9, * * *.

> "Again the same statute is involved, and the same general question is involved: the evasion of the payment of a tax due from the American Brands Corporation, not by filing a false return, but taking the return as filed as correct, by concealing, diverting the assets of that corporation so that the tax could not be collected." (2717)

The ruling below raises an important question of federal law which has not been passed on by this Court and which should be settled by this Court. It is an issue of gravity and general importance in the interests of uniform and proper application of said statute and of marking limits of felony violation and urgently requires review by this Court.

The decision below is in conflict with recent decisions of the Fifth Circuit Court of Appeals which has twice rejected the very contention made by the Government at bar and accepted by the Second Circuit in this case. The Fifth Circuit has dismissed indictments charging as felony the wilful "failure to pay" a tax,[9] and on an identically worded statute.[10]

Lawn was charged solely in counts seven and nine and the conspiracy count. As to Lawn, the theory of pleading and proof was that there was no deficiency, i.e., that the tax returns were proper reports and properly disclosed the basis for imposition by the Government of the tax. Avoidance of payment was the gravamen underlying the charge that Lawn had assisted the taxpayers. This was not felony.

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[9] *Clay* v. *United States*, 218 F. 2d 483, 485 (5 Cir. 1955); *Cf. Jones* v. *United States*, 164 F. 2d 398 (5 Cir. 1947).

[10] Title 26 U. S. C. § 2707(c).

Thus, in Gilman, *Current Problems in Criminal Tax Fraud*, 33 Taxes 749, 752 (October, 1955), the principle is stated as follows:

> "* * * under the law as it is now, a deficiency must be proved in order to sustain the felony conviction under Section 7201." [11]

III.

Question No. 4

There was no direct proof that Lawn knew that his co-defendants owed taxes, did not pay the same and had no intention of paying the same, nor was there proof of any circumstances from which such knowledge could be inferred. Without such proof Lawn's acts were innocent. The prosecutor relied on proof of Lawn's background as a lawyer and argued that it should be assumed or presumed that Lawn had the requisite knowledge (e.g. 1365). The Court below held that the requisite knowledge could be presumed because Lawn was of "admitted legal astuteness." The Court below noted that because the transactions "proliferated around" Lawn it would be "wholly amazing" to credit Lawn with lack of knowledge (Appendix A, *infra*, p. 29).

We contend that the constitutional presumption of innocence may not be overcome by an opinion that absence of the requisite element of knowledge would be an amazing assumption nor can guilty knowledge be inferred from general legal astuteness. Reasoning to the contrary cannot be used to overthrow the presumption of innocence or to shift to the defendant a burden to exculpate himself.[12] An inference of guilty knowledge cannot be predicated on an inference of

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[11] Section 7201 of the 1954 Code is the successor to Section 145(b) of the 1939 Code under which the petitioner was prosecuted. "Deficiency" is defined in Section 6211 of the 1954 Code.

[12] *Tot* v. *United States*, 319 U. S. 466 (1943). Due process makes it impermissible "thus to shift the burden by arbitrarily making one fact, [legal astuteness] which has no relevancy to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation" at p. 469 of 319 U. S.

legal astuteness.[13] Knowledge is indispensable for criminal intent.[14]

IV.

Question No. 5

Lawn's conviction rests squarely on the rejection by the Court below of the doctrine relating to the crimes of aiding, abetting and conspiracy adopted by another bench of the Second Circuit in *United States* v. *Peoni*, 100 F. 2d 401, 402 (2 Cir. 1938), and crystallized by this Court in *Nye and Nissen* v. *United States*, 336 U. S. 613, 619 (1949). All of the other Circuits have adopted the doctrine of the *Peoni* case. However, all of the Judges of the Second Circuit are not in agreement with *Peoni*.

The disagreement within the Second Circuit is manifested in the dissent in *United States* v. *Di Re*, 159 F. 2d 818 (2 Cir., 1947), aff'd 332 U. S. 581 (1948). In *Di Re* the dissent proceeded on the ground that association and presence with wrongdoers was sufficient to connect a defendant with crime and to ground a conviction for aiding and abetting or conspiracy (820-1 of 159 F. 2d). The holding of the Court below has probably changed the law in the Second Circuit to conform on this point with the dissent in *Di Re* and is probably in square contradiction with the cases in every other Circuit and with the cases in this Court.

Lawn's connection under count seven was to give Giglio the name of a man, Tepper, who might handle the legal matters involved. Lawn did not undertake any legal service nor receive any of Giglio's assets. This association by Lawn did not make him an aider and abettor.[15]

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[13] *Wesson* v. *United States*, 172 F. 2d 931, 933 (8 Cir. 1949); *Johnson* v. *United States*, 195 F. 2d 673 (8 Cir. 1952); *United States* v. *Murphy*, 222 F. 2d 698, 700. (2 Cir. 1955).

[14] *Legatos* v. *United States*, 222 F. 2d 678, 688 (9 Cir. 1955).

[15] *Morei* v. *United States*, 127 F. 2d 827 (6 Cir. 1942); *Nye and Nissen* v. *United States*, 336 U. S. 613, 619 (1949); *United States* v. *Dellaro*, 99 F. 2d 781 (2 Cir. 1938); *United States* v. *Di Re*, 159 F. 2d 818 (2 Cir. 1947) aff'd. 332 U. S. 581 (1948); *United States* v. *Moses*, 220 F. 2d 166 (3 Cir. 1955); *Hubley* v. *United States*, 150 F. 2d 165 (5 Cir. 1945).

Parenthetically, conviction in New York on count seven simply ignored that the only permissible venue was New Jersey where the real estate was located, where every transfer was publicly recorded and where the entire transaction took place.[16]

Lawn's connection under count nine was the charge that he received compensation for services in legitimate functions of the corporation—research and export-import. The Court below ruled that such compensation could be deemed for services rendered in furtherance of tax conspiracy.

The receipt of salary compensation for legitimate services was not such a purposive entry into the venture as to support Lawn's conviction.[17]

Nor was Lawn's connection under the conspiracy count established with legal evidence.

There is no record evidence of any acts of Lawn within the legally permitted period to connect him with conspiracy.

The conspiracy had ended mid-September 1947 when all of the tax returns were filed.[18]

The indictment was obtained on July 23, 1953. Acts earlier than July 23, 1947 and acts later than September 1947 were admitted in evidence and relied on by the Court below to sustain the conviction. This was fundamental error.[19]

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[16] *Reass* v. *United States*, 99 F. 2d 752 (4 Cir. 1938); *United States* v. *Jones*, 174 F. 2d 746 (7 Cir. 1949); Amendment VI, United States Constitution.

[17] *Morei* v. *United States*, 127 F. 2d 827 (6 Cir. 1942); *Hubby* v. *United States*, 150 F. 2d 165 (5 Cir. 1945); *United States* v. *Moses*, 220 F. 2d 166 (3 Cir. 1955); *Johnson* v. *United States*, 195 F. 2d 673 (8 Cir. 1952).

[18] *Guzik* v. *United States*, 54 F. 2d 618 (7 Cir. 1932), cert. den. 285 U. S. 545 (1932); *United States* v. *Maloney*, 200 F. 2d 344 (7 Cir. 1952); *Fiswick* v. *United States*, 329 U. S. 211 (1946).

[19] *State acts interdicted. Pinkerton* v. *United States*, 145 F. 2d 252, 254 (5 Cir. 1944); *United States* v. *Schneiderman*, 106 F. Supp. 892, 897-8 (D. C. Calif. 1952).

Post-termination acts interdicted. United States v. *Rosenblum*, 176 F. 2d 321 (7 Cir. 1949), cert. den. 338 U. S. 893 (1942); *Fiswick* v. *United States*, 329 U. S. 211, 216-17 (1946); *Krulewitch* v. *United States*, 336 U. S. 440, 442-3 (1949);

The stale acts relied on by the Court below include the following mentioned in the opinion; the formation of the "American" corporations and the planning by Lawn's co-defendants of schemes for tax evasion.

The post termination acts relied on by the Court below include the following mentioned in the opinion: Lawn's alleged familiarity with certain Government officials and his purported ability thereby to ward off prosecution; the arrangement of the New Jersey receivership; the concealment of Giglio's assets (i.e., his house and lot in New Jersey).

V.

Question No. 6

The case against Lawn was paper thin, and failed to contain any proof at all on essential elements of a crime (e.g., knowledge). The case was further weakened in that it rested on the uncorroborated testimony of Roth, an accomplice, and an admitted perjurer and criminal, who was "cooperating" with the government to save himself and on uncorroborated testimony from Lubben, a like character.

The prosecutor noted the disreputable character of the Government's witnesses and asked the jury to convict because he said:

> "I vouch for Lubben. The Government put Lubben on the stand because they thought that Lubben could be vouched for. I vouch for Roth also * * *
>
> I vouch for them and I will explain precisely why I do in just a moment, but I vouch for them. When I say 'I,' I am referring to the District Attorney's office, and I merely represent them. We vouch for them because we think they are telling the truth." (2587-8)
>
> "I think he told the truth." (2592)

The State Courts specifically strike down convictions so obtained,[20] as does the Fifth Circuit which accordingly is in conflict on the point with the Court below.[21]

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[20] *People* v. *Reimann*, 266 N. Y. App. Div. 505, 507 (1st Dept. 1943).

[21] *Steele* v. *United States*, 222 F. 2d 628, 631 (5 Cir. 1955).

Prosecutors must be fair and they cannot prejudice a defendant by the type of appeals to passion and prejudice or the personal guaranties of guilt used by the prosecutor at bar.[22]

Over twenty years have elapsed since this Court decided *Berger*, and it seems that it is necessary once more to re-examine and reaffirm the principles established by this Court in that case. To countenance such oppressive practices as at bar, even in their mildest form, is to ultimately open the door to wholesale decay of the constitutional rights of citizens, for such decay usually commences by "silent approaches and slight deviations from legal modes of procedure."[23]

The Court below has further condoned as proper argument on summation to a jury that the petitioner was guilty of unconnected crimes not material or established by the evidence (personal tax evasion, fixing, bribery, physical threats) (2600-8, 2674). The prosecutor conceded that part of such charges were "interpolated" (2607-8). All Circuits other than the Court below rule that such conduct requires reversal.[24]

The prosecutor further attempted to influence the action of the jury by reference to presumed public clamor (2673-4).

The Supreme Court and the State Courts strike down convictions obtained through such highly prejudicial conduct.[25]

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[22] *Berger* v. *United States*, 295 U. S. 78 (1935), and see cases collected by this Court at p. 89; *Snipes* v. *United States*, 230 F. 2d 165 (6 Cir. 1956); *Coulston* v. *United States*, 51 F. 2d 178 (10 Cir. 1931); *MacDonald* v. *United States*, 264 Fed. 733 (1 Cir. 1920); *Boyd* v. *United States*, 142 U. S. 450, 459 (1892).

[23] *Boyd* v. *United States*, 116 U. S. 616, 635 (1886).

[24] *Snipes* v. *United States*, 230 F. 2d 465 (6 Cir. 1956); *Coulston* v. *United States*, 51 F. 2d 178 (10 Cir. 1931); *Pierce* v. *United States*, 86 F. 2d 949 (6 Cir. 1936); *Cf. MacDonald* v. *United States*, 264 Fed. 733 (1 Cir. 1920); *Boyd* v. *United States*, 142 U. S. 450, 459 (1892).

[25] *Berger* v. *United States*, 295 U. S. 78 (1935); *People* v. *Esposito*, 224 N. Y. 370, 376 (1918); *People* v. *Fielding*, 158 N. Y. 542 (1899); *Boyd* v. *United States*, 142 U. S. 450, 459 (1892).

The opinion below fails to discuss the issues raised by the summation other than to say that the assignments of error do not show merit and that criticism of the ethics of such a summation was not warranted (Appendix A, *infra*, p. 33).

VI.

Conclusion

In sum, we here have a case failing to vindicate constitutional promises and introducing far reaching innovations in criminal prosecutions; a decision in conflict with decisions of other Courts of Appeal on the same matters and in probable conflict with State law; important questions of Federal law which have not been but should be settled by this Court; and decisions on federal questions in conflict with applicable decisions and standards of this Court. The Court below has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Dated: New York, May 31, 1956.

Respectfully submitted,

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Certificate of Service

I, Milton Pollack, counsel for petitioner in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 1st day of June, 1956, I served copies of the foregoing petition for a writ of certiorari on the United States of America, Respondent, by causing copies thereof to be mailed in duly addressed envelopes, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., and the United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, New York.

Dated, June 1, 1956.

MILTON POLLACK,
Counsel for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 249—October Term, 1955.

(Argued March 6, 7, 1956 Decided April 20, 1956.)

Docket No. 23620

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

WILLIAM GIGLIO, FRANK LIVORSI, and HOWARD LAWN,
Defendants-Appellants,

LOUIS J. ROTH and AMERICAN BRANDS CORPORATION,
Defendants.

Before:

CLARK, *Chief Judge,*

MEDINA, *Circuit Judge,* and GALSTON, *District Judge.*

Appeal from the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge.*

William Giglio, Frank Livorsi, and Howard Lawn appeal from convictions of violations of the Internal Revenue Laws and of conspiracy. Affirmed.

MILTON R. WESSEL, Sp. Asst. to U. S. Atty. for Southern Dist. of N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, and Ira L. Tilzer, Tax Atty., Internal Revenue Service, Washington, D. C., on the brief), *for plaintiff-appellee.*

SOLOMON A. KLEIN, Brooklyn, N. Y. (Harold W. Wolfram, New York City, on the brief), *for defendants-appellants Giglio and Livorsi.*

MILTON POLLACK, New York City (Samuel N. Greenspoon, New York City, on the brief), *for defendant-appellant Lawn.*

CLARK, *Chief Judge:*

Appellants Giglio, Livorsi, and Lawn appeal from judgments of conviction of violations of the Internal Revenue Laws and conspiracy entered after a lengthy trial to a jury. Appellants and one other defendant, Louis J. Roth, who pleaded guilty on all counts and who was a principal witness for the prosecution, were named as conspirators in one count of a ten-count indictment charging violations of 26 U. S. C. §§ 145(b) and 3793(b) and of 18 U. S. C. § 371. In addition, Giglio was named in seven, Livorsi in three, Lawn in two, and Roth in eight substantive counts. The jury found each of the three guilty as charged. A fifth defendant named in the conspiracy count, American Brands Corporation, was eliminated by dismissal of the indictment after the jury failed to report as to it. Judge Walsh sentenced Giglio and Livorsi to a total of fifteen years of imprisonment on the various counts on which they were convicted, while he gave Lawn a total of a year and a day.

The conspiracy here disclosed involved attempts by a variety of means to evade assessment and payment of

federal income taxes on large amounts of income earned in the World War II black market in sugar. The individual and corporate taxes evaded for the calendar year 1946 alone amounted to more than $800,000. Generally three means of evasion of tax assessment were used: (1) the fraudulent allocation of income among the various companies and individuals in the conspiracy, (2) the fraudulent overstatement of expenses, and (3) the failure to disclose income (a technique very infrequently resorted to by these defendants). Further, defendants attempted to defeat collection of taxes through the concealment of the individual assets of Giglio and Livorsi and the misappropriation, conversion, and diversion of corporate assets. The testimony adduced amply sustained the charge.

Giglio and Livorsi were the central figures in the conspiracy. It was they who profited so royally as equal partners in the fabulous proceeds of the wartime black market. And it was they who procured the services of Roth, an accountant, to assist them in protecting their ill-gotten gains from tax claims. Lawn, a lawyer, had been Chief of the Criminal Division of the United States Attorney's Office for the District of New Jersey before entering their employ. He participated in much of the planning of the conspiracy for evasion of taxes by Giglio-Livorsi enterprises. He held executive positions in some of the participating companies; and, although his beneficial stock interest was small, he, like Roth, received substantial compensation for his services.

It is neither necessary nor feasible to describe here all the details of the multifarious techniques of tax evasion employed in the furtherance of this conspiracy, but sufficient facts should be set forth to show the magnitude and ingenuity of the operation. In April, 1945, the Tavern Fruit Juice Company was organized as a partnership. Giglio and Livorsi, the two real partners, also listed their wives

as partners, though the latter contributed no capital to the enterprise. The information return of Tavern partnership falsely listed the wives as partners, even though Giglio and Livorsi later picked up the wives' supposed distributive shares on their own personal tax returns.[1]

About a month after Tavern was organized, a second partnership, Eatsum Food Products Co., Ltd., was launched. The true partnership interest at the time of formation in this enterprise was as follows: Giglio, 25%; Livorsi, 25%; and Lubben (a key government witness at the trial below), 50%. But a partnership information return for Eatsum was filed showing several dummy partners, including the wives of Giglio and Livorsi. The wives' income was in fact picked upon the husbands' individual returns. Nine months after its formation the Eatsum partnership agreement was modified, Lubben agreeing to accept about $117,000 as his distributive share of the partnership profits in return for the right to start a separate business and Giglio agreeing to pay the taxes on Lubben's share.

Of the two partnerships, during the first nine months of operation Eatsum alone earned almost three-quarters of a million dollars. In order further to reduce taxes the conspirators set up a series of corporations, each bearing in some combination the name "American." The purpose of the corporations was to drain off the profits of Eatsum

[1] In this connection the witness Roth was asked the following question by the prosecutor: "Well, if you filed an individual return for Mr. Giglio and Mr. Livorsi, picking up those figures, why didn't you change the partnership information return so that it wouldn't indicate that the wives were partners?" His reply was: "The reason I didn't file the reason I picked up the income of the wives on the individual husbands' tax return, these taxes, the tax liability, the tax that was due, there was no money to pay, and it was never intended at that time to pay it; and in order to avoid the women having trouble with the Tax Department, we picked up the wives' income on the husbands' tax returns, so that all the trouble would accrue to the husbands."

through the use of fraudulent invoices. The corporations were then to be dissolved before taxes fell due, and no income would be reported. The important corporations themselves were financially successful. So, in order again fraudulently to minimize taxes, Giglio and Roth procured the filing in the name of American Brands Corporation of a consolidated return covering the associated corporations, even though they knew that the parent-subsidiary relationship required by statute did not exist.

As thus indicated, appellants rarely resorted to an actual failure to report income. Roth's testimony, however, disclosed one illuminating instance in which such a failure apparently did take place. Part of the Eatsum operation involved the purchase and sale of corn and corn syrup, with black market price overages being paid and received in cash passing through a cash box kept in the Eatsum office. Over $400,000 in cash passed through the cash box in the course of the corn syrup operations, resulting in a profit to Eatsum of about $140,000. Apart from an item of $50,000 of "Other Income" entered on both Livorsi's and Giglio's return, the cash box profit was not reported.

Another device used for the evasion of tax assessment consisted of fraudulent deductions for fictitious expenses and purchases. Along similar lines $63,091.52 in Tavern closing inventory was not reported, thereby fraudulently reducing the reported income of Tavern and shifting the inventory to American Brands, where it would not be reported until a corporation return was filed at a later date.

In addition to their efforts to defeat the imposition of full tax liability, appellants sought in a number of ways to delay, hinder, and prevent the collection of those taxes for which they admitted liability. They accomplished this result by filing late returns, by failure to withhold taxes as required by law, by filing false estimated personal tax returns, by filing false tentative corporate returns, by

filing returns in the wrong district, by filing false returns for certain third persons in order to obviate the necessity of disclosing certain "cash box" receipts by Eatsum, and possibly also by filing an inaccurate carry-back loss claim and by the erroneous reporting by Giglio and Livorsi of $50,000 of "other income." Upon the filing of all tax returns here relevant, on September 15, 1947, the conspirators made an extensive effort to convert leviable assets to cash. A particularly colorful incident in this process was the sale of the Livorsi estate in New Jersey. Livorsi received a check for $64,335.49 in payment for his equity in this property, which he subsequently cashed at the Merchants Trust Company in Red Bank, New Jersey. He left the bank with the entire amount in currency stuffed in his trousers' pockets.

Similarly, four days before the filing of tax returns, with the assistance of Lawn, Giglio transferred his New Jersey estate to Roth, even though Giglio continued to live in it. Four days after tax returns were filed a $15,000 interest in the Van Dyck Industrial Corporation held in Giglio's name was sold, the proceeds going to Roth's special bank account and thence into the American Brands Corporation; it was never used to satisfy the tax liability of the corporation. Again in September, 1947, there was a sale of the Manhattan offices of the various enterprises for $10,000; but Roth had no knowledge of this money's being used to pay taxes. Before and after the filing of returns the conspirators withdrew large amounts of cash from the various "American" corporations, charging off these withdrawals to selling or other expense. The corporations went into state receivership in New Jersey in late 1947, and loans in comparatively large amounts owed by various of the conspirators to the corporations were concealed through falsification of the books. Further, as a result of the receivership, corporate assets were sold at

a sacrifice and the proceeds were not applied to discharge the federal income tax liability. One of the most substantial physical assets was the equipment in a plant in New Jersey. Years after the disposal of this asset in receivership, Giglio continued to operate at the plant. There was evidence of concealment and destruction of records, threats to potential witnesses,[2] improper influence and bribery, receivership and bankruptcy proceedings tinged with fraud, and subornation of perjury.

The *admitted* tax liability for the year 1946 of Giglio, Livorsi, and American Brands Corporation according to their filed returns was $573,683.73. The total tax paid was $16,735.95. This astronomic discrepancy (which is exclusive of falsification of the returns themselves), when viewed in connection with the activities outlined above, demonstrates why there was no reasonable doubt of the guilt of these conspirators. This is quite obviously true as to Giglio, the active manager of the enterprises, and as to Livorsi, his equal partner, who, although not so active as Giglio in the routine

[2] David G. Lubben, at one time a partner of Giglio and Livorsi, testified on direct examination as follows:

"Q. You also said in this conversation that you had previously been told to keep your mouth shut. When was that? A. I was told by Mr. Giglio to stay away from 253 [Broadway (the New York headquarters of special Treasury agents)] and to keep my mouth shut, that everything would work out all right. I was also told by Mr. Roth if I ever opened my mouth I would find myself at the bottom of the Hudson River in a cement box."

Bernard Bercu, a certified public accountant, testified on direct examination:

"Mr. Giglio was in my private office, explaining to me—perhaps I will put it directly: Mr. Giglio said to me that these work papers were being destroyed because of his—because, as he said, he wanted to know that his partnership affairs were kept within his control and that no outsider knew anything about them.

"He then said to me, 'We have ways of taking care'—and this is in substance, because this happened ten years ago, or nine years ago—in substance he said, we have ways of taking care of any man who talks about our affairs out of turn."

operation of the businesses, nonetheless knew of and approved the major conspiratorial acts. So Livorsi, who in direct furtherance of the conspiracy demanded and carried away from the Red Bank, New Jersey, bank over $64,000 in cash received for his New Jersey estate, was clearly anything but ignorant of the fraudulent character of other activities from which he thus handsomely profited.

As for Lawn, although he did not partake of the fruits of the conspiracy on the scale of Giglio and Livorsi, there is ample evidence to establish his guilt as charged. A significant part of his value to the conspiracy was his alleged familiarity with certain government officials and his purported ability thereby to ward off prosecution. He was the legal adviser to Giglio and Livorsi, and he participated in the planning and execution of a number of the schemes for tax evasion. For a person of his admitted legal astuteness to deny knowledge of the fraudulent transactions which proliferated around him is wholly amazing. He seems to have been particularly active in the formation of the "American" corporations, the concealment of Giglio's assets; and the arrangement of the New Jersey receivership; but of course his culpability is by no means limited to these phases of the developing scheme. He served as an officer or a director of several of the enterprises involved, and he received ample compensation for his services rendered in furtherance of the conspiracy.

Against this background so conclusively establishing the guilt of these appellants, numerous assignments of error are for the most part entirely insubstantial and in no event present difficulty. Primarily appellants allege an invasion of their constitutional rights through the use of evidence obtained in violation of their privilege against self-incrimination. An indictment found in 1952 against these same defendants had been dismissed by Judge Goddard, who

held that defendants' testimony and production of partnership records before a grand jury constituted a violation of their privileges against self-incrimination because at the time of the grand jury hearings these defendants were also defendants in pending criminal informations and were not advised on the record of their rights. *United States* v. *Lawn*, D. C. S. D. N. Y., 115 F. Supp. 674.[3] In 1953 the indictment in the present case, similar to, but not identical with, the 1952 indictment, was found. Defendants moved to dismiss the 1953 indictment on grounds that it was tainted with the same alleged illegally obtained evidence; to suppress evidence, leads, and clues derived from the tainted source; to direct a hearing to ascertain the scope of the suppression order; to direct that the minutes of the grand jury proceedings leading to the 1953 indictment be made available to defendants; and to direct return of the books and papers covered by Judge Goddard's order. Except for a direction of return of these books and papers, Judge Palmieri denied the motion in a reasoned opinion. *United States* v. *Giglio*, D. C. S. D. N. Y., 16 F. R. D. 268. At the trial, Judge Walsh, relying on Judge Palmieri's opinion and the reasoning incorporated therein, denied similar motions.

It was a proper exercise of discretion for the judges to rely upon the detailed affidavits of government attorneys and investigators setting forth the sources of evidence used in obtaining the 1953 indictment and demonstrating that it was not based upon the alleged illegally obtained material. The mere fact that Judge Goddard dismissed the 1952 indictment because of the use of allegedly illegal evidence did not create a requirement as a matter of law for cross-examination of

[3] The government's appeal was dismissed as not timely filed, *United States* v. *Roth*, 2 Cir., 208 F. 2d 467; but, as the two opinions in *United States* v. *Scully*, 2 Cir., 225 F. 2d 113, show, the legal problem is still open before us.

government witnesses and examination of government documents and grand jury minutes; and particularly is this so in the face of the strong adverse showing made by the affidavits of the prosecution. See *Nardone* v. *United States*, 308 U. S. 338; *Goldstein* v. *United States*, 316 U. S. 114, affirming *United States* v. *Goldstein*, 2 Cir., 120 F. 2d 485; *Lapides* v. *United States*, 2 Cir., 215 F. 2d 253; *United States* v. *Flynn*, D. C. S. D. N. Y., 103 F. Supp. 925. Under the circumstances here presented, the decision not to accord a full dress hearing upon oral testimony, together with disclosure of the grand jury minutes, was within the sound discretion of the court. See *Carrado* v. *United States*, D. C. Cir., 210 F. 2d 712, certiorari denied 347 U. S. 1018; *United States* v. *Foster*, D. C. S. D. N. Y., 80 F. Supp. 479.

Moreover, this is a case of great complexity developed during years of investigation. Sufficient evidence had been adduced even by 1950 for the case to become the subject of several days' testimony before the Kefauver Committee, and criminal informations were filed shortly thereafter; investigation and development of evidence continued after that time. If it be conceded that some additional evidence tainted with unconstitutionality may have entered into the finding of the 1952 indictment, it does not follow that the 1953 indictment was not based exclusively upon the massive evidence not so tainted. In the face of the government's detailed affidavits, appellants have clearly failed to sustain their burden of proving the contrary.

As to the further contention that the so-called "tainted" evidence may have been used at the trial itself (in contrast to its use in procuring the indictment), it is clear that appellants had a right of full cross-examination during the trial as to the sources of government exhibits and that they exercised this right on a number of occasions. On defendants' motion to dismiss at the conclusion of the govern-

ment's case, Judge Walsh found nothing in the record of trial suggesting any use of illegal clues. We see no basis for contravening this finding.

Lawn makes strident objection to the introduction of government Exhibit 61A-B—a photostatic copy of a check payable to Lawn and the check-stub page corresponding thereto, bearing grand jury markings and allegedly elicited before the 1952 grand jury in violation of Lawn's constitutional privilege. But before introduction at the trial this evidence was the subject of preliminary questioning by Lawn's able and experienced trial counsel (now deceased) who finally interposed "no objection" to its admission. Further, on this appeal the government offers to prove that other copies of the same documents were in its possession months before the 1952 proceedings and that these "untainted" copies could have been easily substituted at trial if the discrepancy had been pointed out by objection of defense counsel. Lawn therefore suffered no harm whatsoever and has obviously waived his objection.

Appellants further object to various consequences of Judge Walsh's action in cautiously removing from the consideration of the jury the question of the "distributive shares" from the Eatsum partnership. In this regard the contention of the government was in essence that the distributive share of the Giglio-Livorsi group had been increased from its original 50 per cent by reason of Lubben's agreement of March, 1946, to accept $117,000 in lieu of his original share, and that, therefore, the 1946 personal returns of Giglio and Livorsi correspondingly understated their income. Appellants on the other hand argued that Lubben was charged with the full 50 per cent fixed by the original partnership agreement, and that the taxable share of the Giglio-Livorsi group could not therefore exceed 50 per cent. In order to avoid this confusing problem in tax law, the judge instructed the jury to disregard alleged understatement of income from Eatsum

in considering the counts charging the falsification of individual returns. Since, however, there was evidence of understatement of income from sources other than Eatsum, the verdict on these counts must stand. The charge was not misleading.

In cross-examination of a government witness friendly to appellants, defense counsel elicited testimony that "Mr. Giglio was well regarded in the [Long Branch] area." Defense counsel had been previously informed by the court that his question went beyond the scope of the direct examination. On redirect examination the prosecutor asked the witness whether or not his opinion of Giglio's reputation would have been affected by knowledge of Giglio's arrest in Detroit. Judge Walsh sustained an objection to the question and instructed the jury to disregard it, although he stated that he would rule the other way if the prosecutor insisted. Since defense counsel deliberately opened the door to this line of questioning, since the prosecutor's question was in apparent good faith, and since in any event the jury was instructed to disregard the question, there was no error. See *Hyers v. United States*, 8 Cir., 171 F. 2d 329, certiorari denied 338 U. S. 849.

There is no occasion to discuss the numerous other assignments of error—none of which showed merit. We are constrained to say that the presentation of this appeal was marred by a virulent attack, particularly on behalf of appellant Lawn, upon the integrity and the ethics of the prosecutor. An examination of the record shows that this was utterly unwarranted. On the contrary, he and his associates conducted the prosecution with devotion, responsibility, and rare skill against experienced and determined defense. We do not think that even the exigencies of the defendants' case justified or excused this attack. The trial was fair and the result proper, if not inevitable.

Affirmed.

APPENDIX B

United States Constitution

Amendment V

82ND CONGRESS SENATE DOCUMENT 170, P. 40

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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52 Stat. 513 (1938),

26 U. S. C. Sec. 145(b)

Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this subchapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

44 Stat. 116, 117 (1926).

26 U. S. C. Sec. 2707(c)

Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.